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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1801

THE STATE OF NORTH CAROLINA,

Petitioner,

vs.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN MATHIESON CHEMICAL CORPORATION AND THE UPJOHN COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Brief in Opposition for Respondent Pfizer Inc.

JULIAN O. von KALINOWSKI,
ROBERT E. COOPER,
JOHN J. GERAGHTY,
Attorneys for Respondent Pfizer Inc.

Of Counsel:
GIBSON, DUNN & CRUTCHER,
515 South Flower Street,
Los Angeles, Calif. 90071,

POYNER, GERAGHTY, HARTSFIELD & TOWNSEND,
615 Oberlin Road,
Raleigh, North Carolina 27605,

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Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Brief in Opposition for Respondent Pfizer Inc.

Statement.

This is an antitrust treble-damage action involving allegations of conspiracy among respondents in violation of Sections 1 and 2 of the Sherman Act and also involving, albeit belatedly, an allegation of unilateral misconduct by respondent Pfizer Inc. ("Pfizer") in violation of Section 2 of the Act. 384 F.Supp. at 268-270. Although petitioner's statement of the facts is highly selective and argumentative, it suffices for present purposes to simply note that the District Court heard testimony totaling more than 11,000 pages of

transcript and received more than 1,900 exhibits, and, based on all the evidence, held that petitioner had failed to establish the alleged violations. *Id.* at 288-89. With regard to the alleged conspiracy among respondents, the District Court concluded that "the evidence does not support the charge of conspiracy based on secret agreements growing out of the twin nuclei of plaintiff's case, the McKeen-Malcolm meetings and the procurement of the Conover patent"; the Court then examined "all other evidence in the record to ascertain if inferences arise thereon sufficient to sustain plaintiff's restraint of trade and monopoly charges," but found "the inferences conflicting and of insufficient force to carry plaintiff's burden of persuasion." *Id.* at 283. With respect to the unilateral charge against Pfizer, the District Court specifically found that "in addition to its failure to prove that Pfizer procured the Conover patent by fraud or that it misused a valid patent, plaintiff has failed to establish the essential elements of an attempt to monopolize." *Id.* at 288. The Fourth Circuit affirmed, holding that the findings of the District Court were not clearly erroneous. Pet. App. A at A-26 - A-28.*

Summary of Argument.

Petitioner's first three questions, all of which relate solely to its allegations of fraud on the Patent Office, are not appropriate for certiorari because the decision below must be sustained on independent grounds, specifically the District Court's findings that petitioner had failed to establish other essential elements of the alleged violations of the Sherman Act. 384 F.Supp. at 281, 288.

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*Pet. refers to the petition for certiorari; Pet. App. refers to the appendices thereto.

There is no conflict in decisions as to the "legal interpretation of U.S. Patent Office records," as Question A states, because the earlier decision of the Sixth Circuit held that those records were insufficient to support a finding of misrepresentation by Pfizer. *American Cyanamid Co. v. Federal Trade Commission,* 363 F.2d 757, 772-79 (6th Cir. 1966). Nor is the result reached by the FTC inconsistent, inasmuch as important, newly developed evidence was presented in the trial below, which fully justified the Court's conclusion that "At best the evidence has left the court with the impression that there was a mutual misunderstanding . . . ." 384 F.Supp. at 281.

Petitioner's Question B does not merit certiorari, because the denial of collateral estoppel by both courts below was so clearly required by established principles of law. The issue in the FTC proceeding was whether the respondents engaged in unfair methods of competition, in violation of Section 5 of the Federal Trade Commission Act; the FTC did not even purport to decide the validity of Pfizer's patent. It would have been inappropriate to accord such an administrative determination, made under a broad, regulatory statute, preclusionary effect in the present action claiming treble damages for a violation of the Sherman Act.

The statutory scheme also prohibits collateral estoppel in this instance. Section 5 of the Federal Trade Commission Act denies the parties to such a proceeding the right to invoke *res judicata* in a subsequent antitrust suit, and it necessarily follows that a stranger cannot derive a higher right and collaterally estop one of the parties. Furthermore, it would be anomalous to accord a Section 5 regulatory proceeding collateral estoppel effect when Section 5(a) of the Clayton Act

provides that a court determination in a criminal or civil action under the antitrust laws is limited to *prima facie* effect only.

Collateral estoppel also is inappropriate because the facts as to which petitioner sought to estop Pfizer were not necessary to the determination made by the FTC, *Yates v. United States,* 354 U.S. 298, 336 (1956), and because the FTC did not have direct jurisdiction to find a violation of the antitrust laws, *United States v. Radio Corp. of America,* 358 U.S. 334 (1959).

Since the District Court found nothing more than a mutual misunderstanding, 384 F.Supp. at 281, and did not find any knowledge of falsity or materiality, petitioner's Question C contrasting *mens rea* and *scienter* is not presented for review on this record.

Questions D, E and F simply invite this Court to make a review of the lengthy trial record, a function not appropriate for certiorari. The opinion of the District Court makes all the findings of fact essential to the judgment below, and further makes it clear that the Court did not require proof of an express agreement, but rather considered all the inferences that petitioner's evidence justified. Nor has petitioner shown that there are any inconsistent or unsupported findings.

Petitioner's questions do not pose any important questions, and do not merit the grant of certiorari.

ARGUMENT.

I

The District Court Found That Other Essential Elements of the Alleged Antitrust Violations, in Addition to Fraud on the Patent Office, Were Not Established. The Decision Below Therefore Must Be Sustained on Independent Grounds and Certiorari Is Inappropriate as to Petitioner's Questions A, B and C Which Relate Solely to Fraud on the Patent Office.

Petitioner's initial three questions challenge the District Court's factual determination that petitioner's evidence did not support a finding of fraud. Petitioner argues, alternatively, that the District Court's finding of no fraud (1) was "in conflict" with the decision in the FTC case, (2) was precluded, on collateral estoppel grounds, by the decision in the FTC case, and (3) was the result of the application of an incorrect legal standard. Not only is petitioner wrong on each point, but petitioner ignores that its claim is for violation of the antitrust laws, not for common law fraud, and that petitioner failed to prove at trial not only fraud but other essential elements of the alleged antitrust violations. The District Court found that the evidence failed to establish collusion among respondents and further found that the evidence failed to establish the essential elements of a violation of Section 2 by respondent Pfizer alone. 384 F.Supp. at 281, 288. Thus, a different resolution of petitioner's fraud charge would not have changed the ultimate outcome of the case. Since the decision below must be sustained on other independent grounds, this Court would not reach the several points related to fraud raised by petitioner in any event, and a grant of certiorari on those questions would be improvident.

II

There Is No Conflict in Decisions and Therefore Petitioner's Question A Does Not Merit Certiorari.

A. The Decisions Are Not in Conflict as to the Interpretation of the U.S. Patent Office Records.

The decision of the Court below, affirming the District Court, is not in conflict with the decision of the Sixth Circuit, affirming the FTC, as to the "legal interpretation of U.S. Patent Office records which are determinative of the same issue of fraud." Pet. 5. In reviewing the initial decision of the FTC, 63 F.T.C. 1747, the Sixth Circuit expressly held that the Patent Office file wrapper, by itself, unsupported by the testimony of Patent Examiner Lidoff who had allowed the Conover patent, was insufficient to support the Commission's findings of misconduct before the Patent Office, even under the lesser standard of proof employed by the FTC. *American Cyanamid Co. v. Federal Trade Commission*, 363 F.2d 757, 772-79 (6th Cir. 1966). The Court considered the charges of improper conduct before the Patent Office at length and found "the decision of the Commission on this issue to be based upon inferences and speculation which are insufficient to constitute substantial evidence." *Id.* at 779.

The only additional evidence adduced in support of the FTC complaint on remand was the testimony of Patent Examiner Lidoff, who was called at the suggestion of the Sixth Circuit. Relying on Lidoff's testimony, a newly assigned Hearing Examiner determined that representatives of Pfizer and American Cyanamid Company ("*Cyanamid*") had made misrepresentations to Lidoff and had withheld material information from Lidoff and that Pfizer and Cyanamid had each thereby violated Section 5 of the Federal Trade

Commission Act, and the Commission subsequently so ruled. *In the Matter of American Cyanamid*, 72 FTC 623, 655 (1967). The Sixth Circuit affirmed on the basis of Examiner Lidoff's testimony and held that the Commission's findings of misrepresentation and withholding of information were supported by substantial evidence, the standard it held to be the proper one for purposes of reviewing an order of the FTC. *Chas. Pfizer & Co. v. F.T.C.*, 401 F.2d 574 (1968), *cert. denied*, 394 U.S. 920 (1969).

Therefore, the decisions of the Sixth Circuit establish that the records of the Patent office, all of which were included in the record in the original FTC case, did not suffice to show fraud. The Sixth Circuit held that a finding of misconduct before the Patent Office could be sustained only on the basis of the supplemental testimony of Examiner Lidoff. Indeed, counsel for petitioner so acknowledged, as the District Court below noted:

> "And with characteristic and commendable candor counsel for plaintiff has conceded that Lidoff's testimony is the *sine qua non* of plaintiff's charge of fraud on the Patent Office.
>
> "THE COURT: Without the testimony of Lidoff do you agree that reasonable minds could differ on the interpretation of the patent record?
>
> "MR. BENOY: Well, without Lidoff being there, I would have to say reasonable minds could differ because we have opposed findings.
>
> "THE COURT: Next question: Does your case on the patent issue, then, [assuming] that reasonable minds could differ on the record without his testimony depend first upon the admissibility of the Lidoff testimony and second its believability?

"MR. BENOY: Well, given the assumption that reasonable minds could differ on the evidence it just has to follow, yes, sir, that it is crucial to the case. I would not contend otherwise." 384 F.Supp. at 279, n. 20.

B. The Decisions Are Not in Conflict Because the Evidence in the District Court Was Significantly Different From the Evidence in the FTC Proceeding.

Important new evidence, developed during pretrial of petitioner's case and introduced at trial, compelled the result in the District Court below. For example, Patent Examiner Lidoff was deposed for eleven days, primarily by respondents, during pretrial of the petitioner's action. In contrast, there had been no opportunity to depose Lidoff in the FTC proceeding and his testimony before the FTC Hearing Examiner was very brief. Lidoff's new deposition testimony, which was read almost in its entirety at the trial in this case, not only undermined the reliability of his reconstructed and speculative testimony before the FTC, but also introduced significant additional evidence not considered in the FTC proceeding. Furthermore, persuasive new expert testimony was offered at trial to establish that Lidoff's reconstructed view of patentability was wrong as a matter of law, and that Pfizer's representatives justifiably would have assumed he was interested in what they understood to be significant legally, not what Lidoff later claimed he must have been interested in.

The new facts adduced in the instant case contributed to the Court's finding that, "At best the evidence has left the court with the impression that there was a mutual misunderstanding between Lidoff and Pfizer's

representatives as to what Lidoff wanted established". 384 F.Supp. at 281. The District Court specifically relied on certain of this newly developed evidence in its written opinion. *Id.* at 278, n. 17 and 279, n. 22. In addition, many of the findings of fact on the patent issue adopted by the Court reflected the new evidence. Pet. App. C, 515a-516a [Findings Nos. 37-39], 520a-522a [Nos. 46-48, 50], and 533a-534a [No. 68].

Therefore, different results were not reached on the same facts because critical evidence—particularly Lidoff's testimony—was different. Given the higher burden of proof required to prove fraud in the judicial proceeding below, that of "clear and convincing" evidence, Pet. App. A, A-21, n. 14, and the significant new evidence adduced below, the District Court's opinion is clearly not in conflict with the earlier FTC decision.*

C. Because the Charge of Fraud Is Particularly Subject to Varying Appraisals, Any Conflict in Decisions Does Not Merit Certiorari.

Fraud or deceit *vel non* is intrinsically an issue that can be resolved differently by different finders of fact. As the Second Circuit stated in *Divine v. C.I.R.*, 500 F.2d 1041, 1047-48 (2d Cir. 1974), knowl-

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*The suggestion, Pet. 4, that there is a conflict between the decision below and the decision of the Eighth Circuit in *Pfizer Inc. v. Lord*, 456 F.2d 545 (1972), lacks any merit. The Eighth Circuit only affirmed a discretionary finding of Special Masters made solely for discovery purposes, that the FTC proceedings were sufficient to establish a *prima facie* case of fraud. Neither the Masters nor the Eighth Circuit made any determination on the merits as to whether a fraud was actually committed.

edge of falsity, a requisite element of fraud, is a "difficult" issue and one "subject to varying appraisals". See also *Fink v. Coates,* 323 F.Supp. 988 (S.D.N.Y. 1971). Thus, the fact that fundamentally different triers of fact, an administrative tribunal and a court, reached different results on different evidence, does not warrant review by this Court, particularly when the factual issues concern events that occurred over twenty years ago.

III

The Denial of Collateral Estoppel Was Clearly Proper and Therefore Petitioner's Question B Does Not Merit Certiorari.

A. The Court of Appeals Properly Denied Collateral Estoppel Because the Circumstances of the FTC Proceeding Did Not Afford Pfizer a "Fair Opportunity" to Litigate the Issue Raised by North Carolina.

The Court of Appeals for the Fourth Circuit found that North Carolina's motion for collateral estoppel was properly denied because "the proceedings before the Commission did not "afford Pfizer and Cyanamid a 'fair opportunity procedurally, substantively and evidentially' to litigate the issue raised in the present case". Pet. App. A, A-20. The Court of Appeals specifically took cognizance of the fact that the FTC case was an administrative proceeding, not a judicial trial, and that the issue was whether the respondents before the FTC were guilty of unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, "a regulatory statute much broader in its scope than the Clayton and Sherman Acts under which the present litigation was instituted". Pet. App. A, A-21.

In reaching its conclusion, the Court of Appeals observed that the consequences flowing from a violation

of Section 5 of the Federal Trade Commission Act are quite dissimilar from the consequences of an action under the antitrust laws. Pet. App. A, A-22. The North Carolina action sought treble damages in an enormous amount, whereas the FTC proceeding was entirely regulatory and prospective. More fundamentally, the FTC did not even purport to decide the issue of patent validity. To the contrary, the remedy ordered by the FTC required Pfizer to issue licenses under the patent at a 2½ percent royalty. *In re American Cyanamid Co.*, 72 F.T.C. 623 at 690 (1967). As the Court of Appeals for the Sixth Circuit stated:

> "The Commission did not undertake to pass upon the validity of the patent, nor do we. The order of the Commission treats the patent as valid and requires compulsory licensing. *The issue here is a violation of Section 5 of the Federal Trade Commission Act, not the validity of a patent.*"
>
> *Charles Pfizer & Co. v. FTC*, 401 F.2d 574, 586 (6th Cir. 1968), *cert. denied,* 394 U.S. 920 (1969) (Emphasis added).

The Court of Appeals was clearly correct in its conclusion that it is inappropriate to give an administrative determination made under a broad, regulatory statute preclusionary effect in a later action for damages based on a narrower, liability statute. See *Hudson River Fisherman's Ass'n v. Federal Power Com'n,* 498 F.2d 827, 834 (2d Cir. 1974):

> "[A] determination under one statute is not binding when the same question arises under another statute . . . especially where the same question is presented to a different forum in a different factual context."

See also *Tipler v. E. J. duPont de Nemour & Co.,* 443 F.2d 125, 128-129 (6th Cir. 1971).

Also significant to the Court of Appeals was the fact that the FTC was operating under a lesser burden of proof than that which obtains in a judicial trial. Pet. App. A, A-21. The Commission's findings were governed by the evidentiary standard of "substantial evidence on the record as a whole", *Chas. Pfizer & Co. v. FTC*, 401 F.2d 574, 585 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969), whereas, as North Carolina conceded, in judicial proceedings the standard of "clear and convincing" evidence applies with respect to issues of patent fraud. Pet. App. A, A-21, *See, e.g., United States v. American Bell Tel. Co.*, 167 U.S. 224, 251 (1897); *Armour & Co. v. Wilson & Co.*, 274 F.2d 143, 148 (7th Cir. 1960); *Tractor Supply Co. v. International Harvester Co.*, 155 U.S.P.Q. 420, 433-34 (N.D. Ill. 1967) The findings of a tribunal operating under a lesser burden of proof than that employed in a second tribunal can have no collateral estoppel effect in the second forum. *FTC v. Cement Institute*, 33 U.S. 683, 708-709 (1948); *Pacific Seafarers, Inc. v. Pacific Far East Line Inc.*, 404 F.2d 804 (D.C. Cir. 1968) *cert. denied*, 393 U.S. 1093 (1969); *United States v. Five Cases, etc.*, 156 F.2d 493 (2d Cir. 1946).

B. The Court of Appeals Properly Concluded That Section 5 of the Federal Trade Commission Act Precludes Application of Collateral Estoppel in This Action.

By the very terms of the Federal Trade Commission Act, no estoppel arises between the *original* parties to a proceeding under Section 5 of the Act with respect to future proceedings under the antitrust laws. Section 5 of the Federal Trade Commission Act specifically provides in subsection (e), 15 U.S.C. § 45(e):

> "No order of the Commission or judgment of court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts."

Because the government is free to litigate under the Sherman or Clayton Acts a matter already decided in an FTC proceeding under Section 5, it necessarily follows as a matter of fairness that the defendant is free to defend in the subsequent antitrust suit. Since the Commission's findings do not constitute an estoppel between the government and the defendant, it is difficult to see how third parties derive some higher right. As the Court of Appeals below put it,

> "It would be strangely unfair to permit the Government to litigate under the Sherman or Clayton Acts an issue earlier decided against it in a Section 5 proceeding, and at the same time deny to a respondent the right to defend on the same issues in a subsequent antitrust suit brought by a plaintiff who was not even a party to the administrative proceeding." Pet. App. A, A-22-A-23.

C. The Court of Appeals Was Correct in Holding That Section 5(a) of the Clayton Act Also Requires Denial of Collateral Estoppel in This Action.

Section 5(a) of the Clayton Act* provides that a final judgment or decree in any civil or criminal enforce-

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*Section 5(a) provides in relevant part:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. . . ." 15 U.S.C. § 16(a).

ment action instituted by the United States under the antitrust laws shall be *prima facie* evidence against the defendant in a subsequent action. During consolidated pretrial proceedings, petitioner moved to have the FTC decision admitted as *prima facie* evidence. That motion was necessarily denied, since the FTC proceedings were brought under Section 5 of the Federal Trade Commission Act rather than "under the antitrust laws" as required by Section 5(a) of the Clayton Act.

The reason *prima facie* effect under Section 5(a) is limited to actions commenced "under the antitrust laws" is abundantly clear. The coverage of Section 5 of the Federal Trade Commission Act, which declares unlawful "unfair methods of competition", is much broader than the Clayton and Sherman Acts. Furthermore, Section 5 is regulatory in nature, whereas the Sherman Act is a liability provision, imposing both civil and penal sanctions.

The illogic of plaintiff's attempt to invoke collateral estoppel is immediately apparent in view of the fact that even a judgment that a defendant in a criminal action violated the Sherman Act is entitled only to *prima facie*, not collateral estoppel, effect in a subsequent damage action. *United States v. Grinnell Corp.*, 307 F.Supp. 1097 (S.D.N.Y. 1969); *see also Purex Corporation Ltd. v. Procter & Gamble Co.*, 308 F. Supp. 584 (C.D. Calif. 1970), *cert. denied*, 405 U.S. 1065 (1972). *See, Note Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions*, 85 Yale Law J., No. 4, p. 541. Furthermore, a defendant in such instances remains entitled to present evidence on his behalf to rebut the plaintiff's *prima facie* case.

If North Carolina had been successful in urging collateral estoppel, the following anomoly would have resulted: an FTC proceeding under Section 5, which is not one of the antitrust laws and which does not purport to establish standards of guilt and liabilty under those laws, would have been afforded full collateral estoppel effect in a subsequent antitrust action, while a judicial determination of an actual criminal violation of the antitrust laws would have been entitled to no more than *prima facie* effect. As the Court of Appeals below opined,

> "it would be paradoxical to accord a Section 5 administrative proceeding the absolute effect of collateral estoppel when a court determination in a criminal action that a defendant had violated the Sherman Act is limited to only *prima facie* effect". Pet. App. A, A-23.

D. Collateral Estoppel Is Inappropriate for Other Reasons Not Reached by the Court Below Which Also Would Compel This Court to Affirm.

1. *The Issues as to Which Petitioner Sought to Collaterally Estop Pfizer Were Not Essential to the Decision in the FTC Proceeding.*

One fundamental requirement of the doctrine of collateral estoppel is that the fact which was actually litigated and determined in the prior proceeding must have been *necessary* to the earlier judgment. Judge Learned Hand recognized this principle in *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir.), cert. denied, 323 U.S. 720 (1944):

> "It is of course well-settled law that a fact, once decided in an earlier suit, is conclusively

established between the parties in any later suit, provided it was necessary to the result in the first suit." 141 F.2d 927, 928.

The requirement that the earlier findings be necessary applies even through the issue may have been litigated and a finding made thereon in the prior litigation. *Halpern v. Schwartz,* 426 F.2d 102, 105 (2d Cir. 1970). This doctrine has been specifically recognized by this Court in *Yates v. United States,* 354 U.S. 298, 336 (1956). *See also, E. V. Prentice Mach. Co. v. Associated Plywood Mills,* 252 F.2d 473 (9th Cir.), *cert. denied,* 356 U.S. 951 (1958); *Fibreboard Paper Products Corporation v. East Bay Union of Machinists, Local 1304,* 344 F.2d 300, 306 (9th Cir.), *cert. denied,* 382 U.S. 826 (1965); *Eastern Foundation Company, Inc. v. Creswell,* 475 F. 2d 351, 354 (D.C. Cir. 1973); *Travelers Indemnity Co. v. State Farm Mutual Auto Ins. Co.,* 330 F.2d 250, 257 (9th Cir. 1964).

This essential element is not met as to the FTC's findings of fraud on the Patent Office. None of the findings with respect to Sherman Act violations was in any way necessary to its determination that the defendant drug manufacturers engaged in unfair methods of competition. Proof of a Sherman Act violation, though relevant, is never the *sine qua non* of a Commission determination of unfair competition. Nor was it essential for the FTC to make a finding that fraud was committed by clear and convincing evidence, inasmuch as the applicable standard of proof was only substantial evidence.

2. *The FTC Did Not Have Direct Jurisdiction to Determine the Issues as to Which Petitioner Sought Collateral Estoppel.*

The FTC's alternative "finding" of fraud on the Patent Office was not within the Commission's direct statutory jurisdiction. No collateral estoppel effect can be accorded a determination by a tribunal which lacks jurisdiction directly to determine that matter. *Restatement, Judgments,* § 71.

This well-settled principle is illustrated by this Court's decision in *United States v. Radio Corp. of America,* 358 U.S. 334 (1959). That case involved the collateral estoppel effect of an FCC determination that an exchange of television stations was consistent with the public interest since, *inter alia,* no anticompetitive effects would flow from the transaction. Despite the FCC's approval, the government subsequently brought suit, claiming that the proposed exchange would violate the antitrust laws. The defendant, RCA, argued that the government was estopped to challenge the exchange on antitrust grounds, since the FCC had decided, pursuant to its statutory obligation, that the exchange would not have anticompetitive effects. The Supreme Court rejected this argument on the ground that the FCC, although empowered to evaluate competitive factors, lacked the requisite jurisdictional authority to determine violations of the antitrust laws. The Court stated:

"The other contentions of appellees fall of their own weight if the FCC has no power to decide antitrust questions. Thus, before we can find the Government collaterally estopped by the FCC licensing, we must find 'whether or not in the earlier litigation the representative of the United

States had authority to represent its interests in a final adjudication *of the issue in controversy'*. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 403, 60 S.Ct. 907, 917, 84 L.Ed. 1263 (Emphasis supplied). But the issue in controversy before the Commission was whether the exchange would serve the public interest, not whether § 1 of the Sherman Act had been violated. Consequently, there could be no estoppel. Res judicata principles are even more inapposite."

United States v. Radio Corp. of America, 358 U.S. 334, 352.

See also, *Fibreboard Paper Products Corporation v. East Bay Union of Machinists, supra,* (NLRB held not to have jurisdiction to determine issues relating to the application of contract terms, hence, collateral estoppel was denied); *Tidewater Oil Co. v. Jackson,* 320 F.2d 157 (2d Cir.), *cert. denied,* 375 U.S. 942 (1963).

The rule enunciated in the *RCA* case is controlling here. The FTC is not authorized to determine violations of the Sherman Act, although it may rely upon conduct falling within the prohibition of the Sherman Act in finding a violation of Section 5 of the Federal Trade Commission Act. *United States v. Cement Institute,* 85 F.Supp. 344 (D. Colo. 1949); *FTC v. Cement Institute,* 333 U.S. 683 (1948); *American Tobacco Co. v. Federal Trade Commission,* 9 F.2d 570, 586 (2d Cir. 1925), *aff'd,* 274 U.S. 543 (1927).

The Commission's findings with respect to Sherman Act violations pertained to matters that the Commission cannot directly determine, were outside its jurisdiction, and thus cannot be accorded preclusionary effect. The

same is also true of the Commission's finding of fraud by clear and convincing evidence. The Commission is not a court of law empowered directly to determine common-law fraud as the basis for compensatory or penal damages.

In addition, since the alternative findings were not specifically affirmed on appeal, collateral estoppel is inapplicable. Thus, the *Restatement Judgments* indicates:

> "If an appellate court determines that one of these [alternative] grounds is sufficient and refuses to consider whether or not the other ground is sufficient, and accordingly affirms the judgment, the judgment is conclusive only on the first ground." *Restatement, Judgments* § 69, Comment (1)(b).

Likewise, Comment (2) states:

> "Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial . . ., the judgment is not conclusive against him in a subsequent action on a different cause of action."

Accord: International Refugee Organ. v. Republic S.S. Corp., 189 F.2d 858 (4th Cir. 1951); *Moran Towing and T. Co. v. Navigazione Libera Triestina, S.A.,* 92 F.2d 37 (2nd Cir. 1937); *Hannahville Indian Community v. United States,* 180 Ct. Cl. 477 (1967).

Accordingly, the FTC's alternative "findings" cannot effect an estoppel between the parties since they were not reviewed and specifically treated by the Court of Appeals.

IV

Since the District Court Did Not Find Scienter, Petitioner's Question C Is Not Presented on This Record.

In an effort to find error where none exists, petitioner purports to find a difference between *mens rea,* a phrase which appears in the District Court's opinion, and *scienter*. Defining *mens rea* as a specific intent to defraud and *scienter* as knowledge of falsity and materiality, petitioner argues that the District Court required proof of *mens rea*, whereas only *scienter* should have been required. It is doubtful that the two terms are different; at least they often are used interchangeably by courts, including this Court, and appear to have a substantially synonymous meaning. See *Smith v. California,* 361 U.S. 147, 150 (1959). Recently, in *Ernst & Ernst v. Hochfelder,* ..... U.S. ....., 47 L.Ed.2d 668, 677, n. 12 (1976), this Court defined *scienter* as "embracing intent to deceive, manipulate, or defraud"—a definition substantially identical to petitioner's definition of *mens rea.*

Irrespective of petitioner's semantic quibble, the fact is that the District Court did not even find *scienter* as defined by petitioner; that is, the Court did not find that any knowingly false or misleading statement was made. Rather, the Court concluded that:

> "At best the evidence has left the court with the impression that there was a *mutual misunderstanding* between Lidoff and Pfizer's representatives as to what Lidoff wanted established." (Emphasis supplied; footnote omitted.) 384 F.Supp. 265, 281.

In view of the above finding, there can be no doubt that the District Court correctly applied the holding

of *Walker Process Equipment Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), which requires proof of a "knowing and willful" misrepresentation to strip a patentee of the antitrust exemption afforded by a patent. Consequently the question petitioner seeks to raise cannot be presented on this record.

V

Petitioner's Questions D, E and F Seek Review of Factual Issues Decided Against Petitioner by Two Courts Below, and Accordingly Certiorari Is Inappropriate.

The final three questions raised in the petition turn on the particular facts of this case and invite this Court to make a third review of the lengthy and complex trial record to determine if it can find what two courts below have been unable to find—proof of conspiracy.* This Court has previously announced that such factual review is not the function to be served by the grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925). Furthermore, the determinations of the courts below are entitled to great weight. As the Court stated in *United States v. Yellow Cab Co.,* 338 U.S. 338,

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*The same result also was reached in the criminal action brought against Pfizer, Cyanamid and Bristol-Myers; the defendants were acquitted when it was retired in 1973. *United States v. Chas. Pfizer & Co.,* 367 F.Supp. 91 (S.D.N.Y. 1973). And in the FTC proceeding, the Commission unanimously dismissed most of the charges of conspiracy in 1963, *In the Matter of American Cyanamid Co.,* 63 F.T.C. 1747, 1962-63, *vacated* and *remanded,* 363 F.2d 757, and later in 1967 dismissed the remaining conspiracy charges by a 2-2 vote. *In the Matter of American Cyanamid,* 72 F.T.C. 623, 688-90, *affid' sub. nom., Charles Pfizer & Co. v. Federal Trade Commission,* 401 F.2d 574 (6th Cir. 1968), *cert. denied,* 394 U.S. 920 (1968).

342 (1949), there is no basis in an antitrust case, as in any other case, for a litigant to ask this Court to conduct " 'What virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design.' "

Each of petitioner's last three questions is treated separately below; however, because those questions raise only factual issues peculiar to this case which already have been resolved twice in favor of respondents, certiorari should be denied.

A. Petitioner's Question D Does Not Merit Certiorari Because the District Court Did Find the Facts Necessary to Support Its Judgment.

Contrary to petitioner's argument embodied in its fourth question, Pet. 8-11, 42-45, the opinion of the District Court clearly and adequately incorporates all findings of fact essential to the judgment below. For example, the District Court discussed at length the settlement of the patent interference between Pfizer and Cyanamid and resolved the issues against petitioner. 384 F.Supp. at 274-76. The Court specifically undertook "[T]o understand properly the motivations and actions" of Pfizer's McKeen and Cyanamid's Malcolm in connection with the settlement meetings, *Id.* at 274, and found that the matters agreed to between Pfizer and Cyanamid reflected "the independent judgments of their chief executive officers" and that the agreements were "fully expressed in the formal documents thereafter executed"—an unmistakable finding that there were no unlawful secret agreements, and that the "purpose of the parties was no more than to settle the interference and resolve the patent blocks."* *Id.* at 276. The Court

*The District Court also adopted findings which specifically negate each of the alleged illicit understandings. Pet. App. C, 464a-465a (Nos. 23 and 24), 570a-571a (No. 45).

also found that "[t]he refusal to license others was no more than a continuation of policies previously followed." *Id.* at 276. With respect to Pfizer's infringement suit settlements with Bristol, Squibb and Upjohn, the District Court found that "the settlements reached following the 'Broady incident' reflected the exercise of sound business judgment and were not the result of any collusive arguments." *Id.* at 287. In the face of those clear findings, it should be evident that petitioner's contentions before this Court regarding the failure to find "purposes" and "operating practices" are unfounded.

Moreover, petitioner's additional, miscellaneous arguments, especially those regarding pricing and alleged price-fixing among respondents, were fully considered and rejected by the District Court. *Id.* at 283. The District Court found the inferences to be drawn from the evidence "conflicting and of insufficient force to carry plaintiff's burden of persuasion." *Id.* Specifically concerning plaintiff's price-fixing argument, the District Court commented:

> "At first blush the argument would appear to have much merit, but a careful review of all the evidence shows the contrary inferences arising thereon to be of equal an in many instances of greater weight." *Id.* at 283.

The judgment below is fully supported by all necessary findings of fact. The law requires that the trial court's findings give the reviewing court reasonable grounds for discerning the factual basis for the decision.* The 1946 Committee Report on Rule 52(a)

*See e.g., *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415 (1943); *Alpha Distrib. Co. of Cal., Inc. v. Jack Daniel Distillery*, 454 F.2d 442, 453 (9th Cir.), *cert. denied*, ... U.S. ..... (1974); *Carr v. Yokohama Specie Bank, Ltd.*, 200 F.2d 251, 255 (9th Cir. 1952).

of the Federal Rules of Civil Procedure states that the trier of fact need make only "brief, definite and pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts."

B. Petitioner's Question E Does Not Merit Certiorari Because the District Court Did Not Require Proof of an Express Agreement.

Petitioner's argument that the District Court applied an erroneous evidentiary standard to prove conspiracy or agreement is unsupported and contrary to fact. The District Court did not require proof of "express agreement" or "direct evidence of the existence of a conspiracy". Pet. 11. Petitioner's contention is based on a footnote to the Court's Opinion stating that the Court "deemed it significant" that neither the federal government in prior proceedings nor the State of North Carolina in the present case had produced any direct evidence of the existence of a conspiracy. 384 F.Supp. at 276, n. 15. Plaintiff's contention that this lack of direct evidence was the only factor considered by the District Court is flatly put to rest by the District Court's statements that it "has been careful to consider all the plaintiff's evidence collectively," 384 F.Supp. at 274, that it considered "the inferences to be drawn from the course of conduct thereafter followed by these parties," 384 F.Supp. at 276, that it considered "inferences favorable to the plaintiff" drawn from the conduct of Pfizer's representatives before the Patent Office, 384 F.Supp. at 282, and that it examined "all other evidence in the record to ascertain if inferences arise thereon sufficient to sustain plaintiff's restraint of trade and monopoly charges". 384 F.Supp.

at 283. From these statements and from the District Court's discussion of the allegations of price-fixing, exclusion of competitors and monopolization, it is clear that the Court considered much more than the absence of direct evidence in reaching its decision and that it carefully weighed all the evidence, both circumstantial and direct.

C. Petitioner's Question F Does Not Merit Certiorari Because the Findings of the District Court Are Not Clearly Erroneous, as the Court of Appeals Correctly Held.

Petitioner's charge that the District Court's findings are internally inconsistent and unsupported by evidence lacks any merit. The only instance cited, a chart of list prices of defendants and Parke-Davis & Company, actually confirms the Court's finding that during the period "under consideration, 1953-1961, Parke-Davis & Company was selling . . . at prices identical with those being charged by defendants . . . ." 384 F.Supp. at 284. The Court found this to be "strong evidence that no conspiracy existed [footnote omitted]", 384 F.Supp. at 285, since no charge has ever been made that Parke-Davis was part of any conspiracy. The price differences between Parke-Davis and the defendant starts in 1960, at the tail-end of the period under consideration, and then Parke-Davis' prices are higher than defendant's prices. The fact that petitioner fails to specify any other "clearly erroneous" findings establishes that its contention lacks any merit whatsoever.

Conclusion.

There is no conflict among the circuits, and the several questions of law petitioner poses not only are correctly decided, but also are inappropriate for certiorari because the decision below must be sustained regardless, on other independent grounds. Thus, petitioner is left with nothing more than a request that this Court retry this case *de novo* on the record, which does not warrant grant of certiorari.

Respectfully submitted,

JULIAN O. VON KALINOWSKI,
ROBERT E. COOPER,
JOHN J. GERAGHTY,
Attorneys for Respondent Pfizer Inc.

Of Counsel:
GIBSON, DUNN & CRUTCHER,
POYNER, GERAGHTY, HARTSFIELD & TOWNSEND.